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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TODD A. BRECHT,

Petitioner,

vs.

GORDON A. ABRAHAMSON, Superintendent,
Dodge Correctional Institution,

Respondent.

**On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit**

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Should the standard for determining whether constitutional error is harmless continue to be the reasonable doubt test of *Chapman* v. *California*?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the standard to be applied to determine whether constitutional error in a particular case is harmless. The current reasonable doubt standard allows too many reversals for unimportant errors. The resulting loss of valid conditions for unimportant errors is

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1. CJLF has received written consent from both parties to file this brief.

contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

Petitioner Brecht was convicted of first degree murder for shooting and killing his brother-in-law, Roger Hartman. *State* v. *Brecht*, 421 N. W. 2d 96, 98 (Wis. 1988). At trial, Brecht put on the defense that the shooting was an accident. Amongst the evidence used to counter this defense was evidence that on three separate occasions Brecht had the opportunity to raise his story about the accidental shooting of his brother-in-law, but did not do so. See *id*., at 100-101. Each of these opportunities happened before Brecht's *Miranda* warnings. See *ibid*.

During Brecht's cross-examination and on closing argument, the district attorney mentioned that Brecht had never said to anyone before the trial that the shooting was accidental. *Brecht* v. *Abrahamson*, 944 F. 2d 1363, 1365 (CA7 1991).

The Wisconsin Court of Appeal found the district attorney's statements to be violations of *Doyle* v. *Ohio*. *Ibid*. The Wisconsin Supreme Court reinstated the conviction, finding *Doyle* error, but finding it harmless. See *id*., at 1365-1366. The federal district court granted Brecht's habeas petition, again finding *Doyle* error and concluding that it was not harmless. *Id*., at 1366. The Seventh Circuit found *Doyle* error but held it harmless under the standard of *Kotteakos* v. *United States*. *Id*., at 1375-1376.

SUMMARY OF ARGUMENT

Stare decisis does not preclude a re-examination of this Court's decision in *Chapman* v. *California*. *Stare decisis* is a policy designed to foster public respect for the law by preserving expectations and advancing the notion of a

coherent body of precedent. *Chapman* is not insulated from re-examination, because it invokes minimal reliance interests and is a constitutional decision.

The reasonable doubt standard of *Chapman* should be overruled. Reasonable doubt is a test appellate courts are ill-suited to apply. It interferes with the jury's findings, and it requires reviewing courts to make an extensive examination of the record.

The reasonable doubt standard is also too high. Properly applied, it is a rule of near automatic reversal. This can lead courts, including this one, to back away from the *Chapman* standard. Such backtracking can only cause confusion within the courts.

The time for retaining *Chapman* has passed. While reasonable doubt may have been necessary when states opposed federal authority, that is no longer the case. State courts can be trusted with a less strict standard.

The proper standard for harmless constitutional error is found in *Kotteakos* v. *United States*. The *Kotteakos* test provides a proper, congressionally-empowered compromise between the need to prevent technical reversal and the need to preserve the integrity of constitutional rules.

Whatever error, if any, that exists in the present case is harmless. The allegedly harmful statements were no more than trivial overstatements.

ARGUMENT

I. *Stare decisis* does not preclude a re-examination of *Chapman* v. *California*.

The Seventh Circuit's decision below demonstrates the weakness of the reasonable doubt standard of *Chapman* v. *California*, 386 U. S. 18 (1967). While the court below limited its holding to the collateral enforcement of prophylactic rules, its reasoning may be carried much further. If the *Chapman* standard may be questioned

under this limited circumstance, then a more general reappraisal of the harmless error standard is in order.

The first step in appraising whether the *Chapman* standard should be replaced is the doctrine of *stare decisis*. Refusing to overturn a decision because of *stare decisis* can be an act of judicial economy, avoiding a re-examination of the case by sticking to the narrower grounds of *stare decisis*.

But *stare decisis* is not a shield for the poorly reasoned or contradictory decision. It "is a principal of policy, and not a mechanical formula . . . ." *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940). Therefore, *stare decisis* should not be viewed as a means of preserving particular decisions, but as the method of preserving the policies the doctrine serves.

A. Stare Decisis.

The fundamental purpose of *stare decisis* is to preserve the rule of law. See *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 700, 112 S. Ct. 2791, 2801 (1992) ("*Casey*"). This allows people to rely upon the validity of decisions in conducting their affairs, and it combats the belief that decisions are the personal whims of judges. See *Vasquez* v. *Hillery*, 474 U. S. 254, 265-266 (1986). By allowing decisions to stay in place, a coherent body of precedent is created. This establishes the rule of law.

Thus, the most important role of *stare decisis* is preserving expectations. "*Stare decisis* provides some moorings so that men may trade and arrange their affairs with confidence. *Stare decisis* serves to take the capricious element out of law and give stability to society." Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949).

If people did not know what to expect from the courts, our lives, particularly in the commercial sphere, would become much more difficult. Contracts could become voided, the title could change hands, and money could be lost if precedent is overruled. See, *e.g.*, *United States* v.

Title Ins. & Trust Co., 265 U. S. 472, 486-487 (1924). Thus *stare decisis* is strongest when property and contract rights are involved. See *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 737, 111 S. Ct. 2597, 2610 (1991).

In criminal cases, different interests are involved. While reliance is important in substantive criminal law, it is not protected through *stare decisis* but rather by limitations on retroactivity. See, *e.g.*, *Marks* v. *United States*, 430 U. S. 188, 196-197 (1977). In criminal procedure, reliance is almost entirely on the side of the prosecution, because only the prosecution's victories are subject to appellate or collateral attack. When a defendant wins an acquittal based upon an existing procedure, the Double Jeopardy Clause prevents reversal. Only in rarest situations, such as restrictions on immunized testimony, will a defendant's reliance interest be protected by *stare decisis*. Criminal procedure precedent favoring criminal defendants involves a more general interest in law. See *Vasquez* v. *Hillery*, *supra*, 474 U. S., at 265-266.

This interest, like reliance, varies in strength with the type of precedent. It is most important in those extremely rare cases involving matters of intense national controversy. In these cases, overruling even an obviously wrong decision may be too expensive to the country.

The Judiciary is the "least dangerous" of the branches because it has the least powers of compulsion, having "no influence over either the sword or the purse . . . ." See *The Federalist No. 78*, at 465 (A. Hamilton) (Rossiter ed. 1961). Instead, the courts must rely on their persuasion and prestige to insure popular acquiescence to their decisions. Thus the Court's power "lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands." *Casey*, *supra*, 120 L. Ed. 2d, at 707, 112 S. Ct., at 2814.

In order to preserve its power of persuasion, at times this Court will preserve some decisions it otherwise would overrule. This doctrine has two applications. First, when the number of decisions overturned has reached a saturation point, "a point beyond which frequent overruling would overtax the country's belief in the Court's good faith." *Id.*, at 708, 112 S. Ct., at 2815.

The other circumstance involves those rare cases of exceptional public controversy.

> "Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve an intensely divisive controversy . . . its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Ibid.*

In these cases, the need to maintain the public's belief in the rule of law can be overwhelming. When it resolves such controversies, any backtracking by the Court can be seen as "a breach of faith" with the rest of the public. *Id.*, at 709, 112 S. Ct., at 2816. Such a result would cause "profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law." *Ibid.*

Most decisions, however, are not so controversial. In most cases, the rule of law is meant to assure society that decisions are based in law, and not in proclivities of individuals. See *Vasquez* v. *Hillery*, *supra*, 474 U. S., at 265.

B. The Limits of Stare Decisis.

While *stare decisis* is an important doctrine serving a useful social policy, it does not have the same force as a statute or the Constitution. The Judiciary's role in our society is as an interpreter of laws. See *The Federalist No.*

78, at 467 (A. Hamilton) (Rossiter ed. 1961). Therefore, *stare decisis*, while respected, cannot deter this or any other court from its ultimate duty of interpreting the law. *Stare decisis* is the servant, not the master, of the law.

This Court has recognized that the doctrine does not have the force of a rule of law and may be overridden when appropriate. "Whether it [*stare decisis*] shall be followed or departed from is a question entirely within the discretion of the court . . . ." *Hertz* v. *Woodman*, 218 U. S. 205, 212 (1910). While it will be followed in most cases, this is only because usually "it is more important that the applicable rule of law be settled than it be settled right." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting).

Perhaps the most important factor in limiting *stare decisis* is the ability of other bodies to overturn this Court's decisions. This Court is particularly reluctant to overturn its own statutory interpretations, because Congress "remains free to alter what [this Court has] done." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173 (1989).

Constitutional cases are another matter. Because " 'correction through legislative action is practically impossible' " constitutional cases have much less precedential force than statutory cases. *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 737, 111 S. Ct. 2597, 2610 (1991) (quoting *Burnet*, *supra*, 285 U. S., at 407 (Brandeis, J., dissenting)); see *Patterson*, *supra*, 491 U. S., at 172-173. Given the necessary tension between our democratic ideals and judicial review under the Constitution, see Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 695-696 (1976), this Court must be ready to re-examine its constitutional decisions in order to maintain the democratic nature of our society.

Refusing to re-examine an incorrect opinion that the public cannot overturn is corrosive to this Court's public respect. Thus the decision to uphold the incorrectly

decided *Lochner* v. *New York*, 198 U. S. 45 (1905) until 1937 helped to damage this Court as a public institution. See *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 705, 112 S. Ct. 2791, 2813 (1992). "Of course it is embarrassing to confess a blunder; it may prove even more embarrassing to adhere to it." *United States* v. *Bryan*, 339 U. S. 323, 346 (1950) (Jackson, J., concurring).

This Court is also more willing to re-examine decisions that have developed contradictions over time. Thus, this Court will not allow *stare decisis* to preserve inconsistent or difficult to administer decisions. See *Patterson*, *supra*, 491 U. S., at 173. Similarly, if the conditions that motivated a decision change, then there is good reason to overrule the prior decision. See *Casey*, *supra*, 120 L. Ed. 2d, at 700, 112 S. Ct., at 2809.

Stare decisis is also weaker in procedural cases. These decisions do not foster the same reliance interests. In criminal procedure there is minimal reliance interest, and nearly all of that is on the side of the prosecution. See part I, *ante*, at 5. Furthermore, changes in procedure usually will not invoke the same public reaction that occurs from changes in substantive law. Procedural rules typically matter only to litigants. As most people are spared the burden of litigation, changes in procedure are unimportant to most. No person could or should plan his life around potential litigation, especially criminal litigation. Unlike substantive decisions, rules of procedure have little effect on our daily lives.

The fact that the *stare decisis* is not a "mechanical rule" is demonstrated by the hierarchy within the doctrine. While some decisions are virtually etched in stone, others warrant more flexibility. For those cases less worthy of *stare decisis*, " 'the process of trial and error so fruitful in the physical sciences is appropriate also in the judicial function.' " *United States* v. *Scott*, 437 U. S. 82, 101 (1978) (quoting *Burnet*, *supra*, 285 U. S., at 406-408 (Brandeis, J., dissenting)).

C. Chapman as Precedent.

When deciding whether *stare decisis* should preserve a decision from re-examination, this Court "is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 700, 112 S. Ct. 674, 2808 (1992). This involves a look into the type of decision involved, the reliance interest it invokes and whether the decision involves a divisive public controversy. See part I A & B, *ante*, at 4-8. Under all of these factors, *Chapman* v. *California*, 386 U. S. 18 (1967) invokes minimal protection from *stare decisis*.

Chapman invokes minimal reliance interest. The reasonable doubt standard imposed by *Chapman* is not something people will rely upon in their daily affairs. Both sides in litigation have an interest in keeping the proceedings free of constitutional error. There is a strong incentive to avoid constitutional error favoring the other side. It is the nature of litigation that parties should try to correct error favoring their opponents at the trial level, instead of waiting for the appeal. At best, it is a very risky proposition to forego curing adverse constitutional error at trial.

Many constitutional rights can be waived by a failure to press for them at trial. See *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). Furthermore, the notion of wily trial counsel allowing the opponent or the court to commit error at trial, so that reversal may be obtained upon appeal, is contrary to the premise behind harmless error rule. See *Kotteakos* v. *United States*, 328 U. S. 750, 759-760 (1946). Therefore, no litigant should allow adverse constitutional error to go unchallenged at trial in the hopes of obtaining a reversal. Any reliance on *Chapman* to reverse on the basis of an error which could have been

corrected at trial is not legitimate reliance, and it is not entitled to protection.

Chapman is also a constitutional decision. The *Chapman* Court was unclear on its authority for its decision. The most precise statement comes in the cryptic passage:

> "We have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent—expressly created by the Federal Constitution itself—is a federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule." *Chapman* v. *California*, 386 U. S. 18, 21 (1967).

An uncritical appraisal of this passage could lead an observer to conclude that *Chapman* is no more than a rule of court readily changed by Congress. This ignores the constitutional basis of this Court's authority in *Chapman*. The only authorities for overriding state laws are the Constitution, the laws enacted under it, and treaties. U. S. Const. art. VI, § 2. *Chapman* did not invoke any statute or treaty. The *Chapman* rule is either constitutionally based or it is illegitimate. Cf. *Chapman*, *supra*, 386 U. S., at 51 (Harlan, J., dissenting) (*Chapman* characterized as a "new constitutional doctrine").

Chapman's reference to the power of Congress to legislate in this area is hollow. When *Chapman* was decided, Congress had enacted a statute, 28 U. S. C. § 2111, that addressed harmless error. The *Chapman* Court recognized that section 2111 did not discriminate between constitutional and nonconstitutional error. 386 U. S., at 22. In *Kotteakos* v. *United States*, 328 U. S. 750, 764-765 (1946), this Court indicated that the predecessor to section 2111 might apply to constitutional error. *Kotteakos* also established a standard for determining the harmlessness of error under section 2111. *Id.*, at 765.

Yet *Chapman* did not rely on section 2111 to establish a harmless error rule. Its reference to the absence of "appropriate congressional action" indicates that section 2111 did not give the *Chapman* Court the authority to formulate a rule for harmless constitutional error. The break with section 2111 is completed by the adoption of the reasonable doubt standard, which is higher than the one used in *Kotteakos*. As the *Chapman* Court ignored the authority of section 2111 in this case, *Chapman* must be a constitutional decision.

The only "congressional action" *Chapman* would deem "appropriate" would be an act establishing the same high standard created in *Chapman*. It could not mean the lower standard supplied by section 2111 and *Kotteakos*. In order to replace *Chapman* with a lower standard, either *Chapman* will have to be overruled or the Constitution must be amended. Therefore, like other constitutional decisions, *Chapman* should be easier to modify or overrule under *stare decisis*. See *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 737, 111 S. Ct. 2597, 2610 (1991).

Some constitutional decisions do warrant more *stare decisis* protection than others. These involve particularly divisive national controversies that this Court's decision has substantially resolved. See *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 708, 112 S. Ct. 2791, 2815 (1992). *Chapman* is not such a case. While it is important, the harmless error standard does not and is not likely to divide the country. It involves the sort of technical issue that the lay public is unlikely to understand well, if at all. Cf. Douglas, *supra*, 49 Colum. L. Rev., at 737. Changing *Chapman* will not erode the nation's confidence in the courts. Cf. *Casey*, *supra*, 120 L. Ed. 2d, at 708-709, 112 S. Ct., at 2815-2816.

II. The reasonable doubt standard of *Chapman* should be abandoned.

A. Appellate Courts and Reasonable Doubt.

The most evident problem with the *Chapman* standard is that reasonable doubt is a test appellate courts are particularly ill-suited to apply. Asking an appellate court to find that an error was harmless beyond a reasonable doubt comes perilously close to second-guessing the jury. While the reasonable doubt question goes to harmless error and not guilt, in practice, application of the *Chapman* standard is very similar to a re-examination of the jury's finding. Determining whether the State has demonstrated, beyond a reasonable doubt, that the error did not contribute to defendant's conviction frequently entails an examination of the strength of the case under the reasonable doubt standard.[2] See *United States* v. *Hasting*, 461 U. S. 499, 509 (1983). "Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed." *Rose* v. *Clark*, 478 U. S. 570, 579 (1986).

Appellate courts are not well-suited to make this type of finding. A reasonable doubt standard, if properly applied, imposes an enormous burden on reviewing courts. Diligent application of the reasonable doubt standard necessarily entails substantial work. Frequently, detailed examination of the entire record will be necessary to ascertain whether there is reasonable doubt. Cf. *Jackson* v. *Virginia*, 443 U. S. 307, 337 (1979) (Stevens, J., dissenting). The reasonable doubt finding in *Chapman* can be just as involved as the one for guilt.

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2. In some cases the entire record cannot be used to justify a finding of harmlessness. Where the error prevents the jury from considering some evidence such as an erroneous presumption, then the evidence not considered may not support a harmless error finding. See *Yates* v. *Evatt*, 114 L. Ed. 2d 432, 449-450, 111 S.Ct. 1884, 1893-1894 (1991).

> "This Court is far too busy to be spending countless hours reviewing trial transcripts in an effort to determine the likelihood that an error may have affected a jury's deliberations. In this case the parties did not provide us with a printed appendix containing any portion of the trial testimony or with any of the trial exhibits that are discussed at some length in the transcript. I have spent several hours reviewing the one copy of the trial transcript that has been filed with the Court. But I have not read all of its 1,013 pages, and I have read only a few of the 450 pages of the transcript of the suppression hearing. The task of organizing and digesting the testimony is a formidable one." *United States* v. *Hasting*, 461 U. S. 499, 516-517 (1983) (Stevens, J., concurring).

Finally, the *Chapman* standard's placement of the burden on the state is also contrary to good appellate procedure. Burdens of proof and presumptions are trial, not appellate tools. "These presumptions and burdens, which expedite the trial process of recreating the facts that lead to the litigation are unsuited to the appellate process of determining whether an error was harmless." R. Traynor, *The Riddle of Harmless Error* 25-26 (1970). By placing elements of the trial into an appellate process, the *Chapman* standard blurs the line between the appellate courts and the trial courts, further weakening the jury process.

B. The Chapman Standard Is Too High.

Setting the proper standard for harmless error can be tricky. Setting the standard too low can subvert the Constitution. See *Chapman* v. *California*, 386 U. S. 18, 23-24 (1967). Yet if the standard is too strict, then it can create contempt for the standard and for the Constitution it seeks to protect. *Chapman* errs too much towards this latter problem.

The single greatest problem with *Chapman* is that the standard, if diligently applied, requires near automatic reversal. See R. Traynor, *The Riddle of Harmless Error* 43-44 (1970). It is always difficult to overcome the test of reasonable doubt, a standard "approaching certainty." See *id.*, at 44.

The difficulty of passing the *Chapman* test is further compounded by the nature of the inquiry being made. *Chapman* does not involve the relatively straightforward question put before the jury over whether the prosecution proved beyond a reasonable doubt that defendant committed the charged crime. *Chapman* is less factual and more psychological. It does not allow the reviewing court to weigh the evidence itself, but instead requires it to gauge the error's impact on the mind of the average jury member. See *Harrington* v. *California*, 395 U. S. 250, 254 (1969); *Milton* v. *Wainwright*, 407 U. S. 371, 377-378 (1972). It is difficult to be nearly certain about such a secondhand conclusion.

The difficulty of finding harmless error under *Chapman* runs contrary to the doctrine of harmless error. The doctrine of harmless error came from our sense of justice. The rule of *per se* reversal that was adopted throughout much of this country was an extreme interpretation of an English decision, which was so contrary to prior common law precedent that Wigmore called it "heresy." See 1 J. Wigmore, *Evidence* § 21, at 888 (Tillers rev. 1983). This led to great injustices as many cases, particularly criminal convictions were reversed on technicalities. "All the sentiment is thrown to weight the scales for the criminal—that is, not for the mere accused, who may be assumed innocent, but for the man who upon the record plainly appears to be the offender that the jury has pronounced him to be." *Id.*, at 895. Similar sentiments led the states and Congress to enact harmless error rules. See *Kotteakos* v. *United States*, 328 U. S. 750, 759 (1946).

The sense of justice that motivates the harmless error doctrine will fuel substantial resistance to needless restrictions on a court's ability to find error harmless.

> "If courts conscientiously apply the *Chapman* test, they will usually find themselves compelled to balk at declaring a belief that there is no reasonable *possibility* that an error influenced the jury. The alternative is to give the test lip service while tacitly discounting it. The very severity of the test invites such discounting to preclude well nigh automatic reversal." Traynor, *supra*, at 44 (emphasis in original); see also Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. Pa. L. Rev. 15, 61, n. 126 (1976).

Trials are costly for the parties, the jurors, and society. See *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U. S. 548, 553 (1984). Retrials are even more costly. Retrial of a reversed conviction requires parties, witnesses, jurors, and courts "to repeat a trial that has once taken place." *United States* v. *Mechanik*, 475 U. S. 66, 72 (1986). This can be particularly burdensome to the victims who "may be asked to relive their disturbing experiences." *Ibid*. The passage of time makes retrial even costlier. As memories fade and witnesses disappear, conviction may be impossible on retrial. Even if there is a conviction, the delay impedes society's interests in retribution and deterrence. *Ibid*. "The doctrine of harmless error conserves judicial resources by obviating retrial for trivial mistakes." Note, *Harmful Use of Harmless Error in Criminal Cases*, 64 Cornell L. Rev. 538, 565 (1979). As *Chapman* will offend a court's sense of economy as well as its sense of justice, courts will be even more inclined to evade strict application of the reasonable doubt standard.

The difficulty courts have with applying the *Chapman* standard is demonstrated by this Court's harmless error cases. The *Chapman* Court criticized the California harmless error rule because it relied too much upon other

" 'overwhelming evidence' " of guilt. *Chapman*, *supra*, 386 U. S., at 23. Instead of looking at whether defendant was guilty in spite of the error, the *Chapman* test required courts to decide whether the error contributed to the conviction. *Id.*, at 26. But in *Harrington* v. *California*, *supra*, this Court began to abandon this central tenet of *Chapman*.

Harrington was one white man who was tried with three black men for attempted robbery and first degree murder. 395 U. S., at 252. At trial, the confessions of Harrington's two nontestifying codefendants were admitted in violation of *Bruton* v. *United States*, 391 U. S. 123 (1968). *Harrington*, *supra*, 395 U. S., at 252. Neither of these confessions implicated Harrington by name, but each referred to the fourth conspirator as the " 'white guy.' " *Id.*, at 253. The confessions were found harmless because they were cumulative and "the case against Harrington was so overwhelming . . . ." *Id.*, at 254.

Although the majority claimed it was not departing from *Chapman*, *ibid.*, the dissent claimed that *Chapman* had been overruled. See *id.*, at 255 (Brennan, J., dissenting). While *Chapman* may not have been dead, it was certainly maimed. It is difficult to see how two confessions stating that one white man and three black men committed the crime did not, beyond a reasonable doubt, contribute to the conviction of the one white man being tried along with three black men. See *id.*, at 257 (Brennan, J., dissenting); Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. Crim. L. & Criminology 421, 427 (1980). This is not to say that *Harrington* reached the wrong result. The evidence against Harrington was overwhelming and consequentially the error was trivial in the context of the trial. See *Harrington*, *supra*, 395 U. S., at 252-254. But the result cannot be reached without a move away from *Chapman*.

In *Schneble* v. *Florida*, 405 U. S. 427 (1972), the departure from *Chapman* continued. The strength of the

case without the error was the primary issue under harmless error analysis. "In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect [of the error] is so insignificant by comparison" that the harmlessness of the error "is clear beyond a reasonable doubt." *Id.*, at 430. While the *Schneble* Court recognized the standard enunciated in *Chapman*, it continued this Court's move away from it. "Thus, unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required." *Id.*, at 432, compare with *Chapman*, *supra*, 386 U. S., at 26 (placing burden of proof on prosecution). Once again, this Court reached the correct result; the *Bruton* error was unimportant in the context of the rest of the case. See *Schneble*, *supra*, 405 U. S., at 430-431. But once again, this Court departed from *Chapman* to reach the proper result.

The practice established in *Harrington* and *Schneble*, looking at the strength of the prosecution's case without the error, is now the standard analysis. See, *e.g.*, *Delaware* v. *Van Arsdall*, 475 U. S. 673, 684 (1986); *Arizona* v. *Fulminante*, 113 L. Ed. 2d 302, 323-325, 111 S. Ct. 1246, 1258-1260 (1991). If this Court has difficulty reconciling *Chapman* with the principle of harmless error, then other courts must have similar qualms.

In *Yates* v. *Evatt*, 114 L. Ed. 2d 432, 111 S. Ct. 1884 (1991) this Court made some effort to get closer to the original jurisprudence of *Chapman*. The *Yates* Court disavowed any notion drawn from this Court's prior cases that harmless error may be found in erroneous presumption cases by examining the entire record. *Id.*, at 449-450, 111 S. Ct., at 1893-1894. The *Yates* Court recognized that *Chapman*'s emphasis was on the error's effect on the jury, not on the strength of the case. Where an erroneous presumption kept a jury from considering certain evidence, that evidence cannot be used as a basis for harmless error. *Id.*, at 450-451, 111 S. Ct., at 1894-1895.

The *Yates* Court still gave the strength of the case great importance. "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question as revealed in the record." *Id.*, at 449, 111 S. Ct., at 1893. The inference from *Yates* is that where the jury did consider all evidence, then the entire record may be used to overcome error. See *id.*, at 450, 111 S. Ct., at 1894. Thus, sufficiently overwhelming evidence should be able to overcome error even after *Yates*, provided that the jury considered it.

The problem courts have with *Chapman* does not stem from an unwillingness to enforce the Constitution, but from the difficulty of applying the exacting reasonable doubt standard to the very difficult question of the error's impact on jury deliberations. This Court has replaced this question with the more factual, and thus less difficult inquest into the strength of the case against the defendant. While this test may work its own justice, it is not an acceptable solution. Courts should not say one thing and do another. *Chapman* should be replaced with a lower and more workable standard, one that more accurately reflects what courts are *really* doing. Cf. *Wainwright* v. *Sykes*, 433 U. S. 72, 94-95 (1977) (Stevens, J., concurring) (*Fay* v. *Noia* standard should be replaced because courts were not really using it).

"No judge in so extended a trial can avoid on occasion rulings that on reflection he will see to have been wrong; but, unless they cut off some really substantial aspect of the truth, or let in too distracting issues, they are not important." *United States* v. *White*, 124 F. 2d 181, 186 (CA2 1941) (Hand, J.).

Learned Hand's admonition is even more important now. In the last few decades constitutional law has become immensely more complicated. See *Doggett* v. *United States*, 120 L. Ed. 2d 520, 539, 112 S. Ct. 2686, 2699 (1992) (Thomas, J., dissenting). Instead of the few, simple

rules actually adopted in 1791, the Bill of Rights has been expanded by decision into a "detailed Code of Criminal Procedure, to which a new chapter is added every year." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 155 (1970) (footnote omitted). *Chapman* might have been appropriate long ago when constitutional law was less complicated, but today, where constitutional error is much more pervasive, a less harsh standard is necessary.

C. Chapman Is Inconsistent.

The inconsistencies generated by *Chapman* come from two main sources. First, the harshness of reasonable doubt standard makes courts unwilling to apply it literally. Therefore, subsequent cases have moved away from the harsh test of *Chapman*. See part II B, *ante*, at 15-19.

The second source of conflict comes from the *Chapman* Court's purported application of *Fahy* v. *Connecticut*, 375 U. S. 85 (1963). The *Fahy* Court found that constitutional error prejudiced defendant because there was "a *reasonable possibility* that the evidence complained of might have contributed to the conviction." *Id.*, at 86-87 (emphasis added). The *Chapman* Court claimed to be adopting this standard when it enunciated its reasonable doubt standard, 386 U. S., at 24, but it is difficult to reconcile these two standards.

The reasonable doubt standard is the highest one in the law, "approaching certainty." See R. Traynor, *The Riddle of Harmless Error* 44 (1970). *Fahy*'s "reasonable possibility" standard is more equivocal than *Chapman*. Even when worded in the negative terms of *Chapman* "whether there was no reasonable possibility that the error contributed to the jury's verdict" the *Fahy* standard is less stringent.

Reasonable doubt protects each individual from criminal conviction unless the trier of fact is convinced of the guilt "with utmost certainty." *In re Winship*, 397 U. S.

358, 364 (1970). This is a "subjective state of near certitude." *Jackson* v. *Virginia*, 443 U. S. 307, 315 (1979). When one deals in "possibility," certainty is not necessarily certain.

The difference between *Fahy* and *Chapman* would be academic had *Chapman* formally abandoned *Fahy*. As the *Chapman* Court did not, a court could claim to be applying the *Chapman* standard while applying the less rigorous *Fahy* test. This has been done by the Eleventh Circuit. In *Hutchins* v. *Wainwright*, 715 F. 2d 512, 517 (CA11 1983), the court equated the *Fahy* test with the *Chapman* standard. As *Chapman* "purported merely to apply the standard previously established in *Fahy*" the *Hutchins* opinion was deemed acceptable. *United States* v. *Lehder-Rivas*, 955 F. 2d 1510, 1517, n. 3 (CA11 1992). Until the reasonable doubt standard of *Chapman* and its improper reliance upon *Fahy* are removed, contradictions like this will be possible and legal.

D. Chapman Is Unnecessary.

Chapman v. *California*, 386 U. S. 18 (1967) was decided in the middle of this Court's criminal procedure revolution. Landmark cases such as *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), *Mapp* v. *Ohio*, 367 U. S. 643 (1961), and *Miranda* v. *Arizona*, 384 U. S. 436 (1966) had only recently been decided. These and other revolutionary changes in criminal procedure that occurred during the 1960's caused some resentment in the state courts. Their criminal cases were now subject to a much higher level of federal scrutiny than before. Harmless error could have been a way for state courts to avoid this Court's decisions. By forcing states to adopt a high standard for harmless constitutional error, *Chapman* helped ensure that state courts did not subvert the Constitution. Cf. Mouse, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 Minn. L. Rev. 519, 530, n. 76 (1969) (*Chapman* standard is stricter than most state tests).

Chapman was decided when federal authority was still bitterly resisted. Only a few years earlier a state court of general jurisdiction answered a federal constitutional objection by saying "that the 'case [was] not being tried under the Federal Constitution.' " *Estes* v. *Texas*, 381 U. S. 532, 536 (1965). Furthermore, the "massive resistance" of some states to the federal authority to enforce civil rights was not yet dead. Therefore, the *Chapman* Court may have had good reason to distrust some state courts.

Fortunately, times have changed. These problems are inconceivable today. The supremacy of federal law is universally acknowledged and is routinely applied in the state courts. See *Stone* v. *Powell*, 428 U. S. 465, 493, n. 35 (1976); *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 210-211, 110 S. Ct. 2822, 2831 (1990). State courts may interpret the Constitution in ways later disapproved, but they no longer refuse to follow it.

While the times have changed, *Chapman* has not. Its overly restrictive standards still needlessly prevent harmless error findings. State courts are now as worthy to trust with the Constitution as any federal court. They "are no less under duty to observe the United States Constitution than is this Court." *Williams* v. *Kaiser*, 323 U. S. 471, 482 (1945) (Frankfurter, J., dissenting). *Chapman* should not be retained out of any unwarranted fear of state courts.

The two other possible reasons for retaining the *Chapman* standard do not withstand scrutiny. The high *Chapman* standard could be justified on the ground that constitutional rights are more important than lesser rights, and thus warrant a higher standard for harmless error. This confuses the type of error with whether the error actually was harmless. Nonconstitutional error can be just as prejudicial as constitutional violations. See Note, *Harmful Use of Harmless Error in Constitutional Cases*, 64 Cornell L. Rev. 538, 551 (1979). "Fundamental" and "constitutional" ceased to be synonymous many, many

years ago. See *Rose* v. *Lundy*, 455 U. S. 509, 543, n. 8 (1982) (Stevens, J., dissenting).

Kotteakos and *Chapman* amply illustrate that constitutional rules are not inherently more "important" than nonconstitutional rules. The error in *Kotteakos* was in the instruction on conspiracy. It went to the very heart of the case. The trial court flatly and wrongly told the jury that there was one large conspiracy, when in reality there were many separate, smaller conspiracies. *Kotteakos* v. *United States*, 328 U. S. 750, 767-768 (1946). Such an error raises a grave possibility of conviction of an innocent person, because the overt act of one conspirator may be imputed to another. *Id*., at 771.

Chapman, in contrast, involves a rule with minimal relation to accuracy of the verdict. The fact of defendant's refusal to testify is perfectly obvious to the jury. *Griffin* v. *California*, 380 U. S. 609, 621 (1965) (Stewart, J. dissenting, joined by White, J.) The inference drawn by the former California rule is logically valid and had been sanctioned by a host of authorities. *Id*., at 622. The *Griffin* rule is based on an external policy unrelated to the accuracy of the trial, and it is an extreme extrapolation of that policy. To say that comment on failure to testify is a higher order of error than grossly wrong instruction on the nature of the crime would be patently absurd. Yet *Chapman* assigns a higher harmless error standard without regard to the importance of the error.

Furthermore, the high *Chapman* standard can work to denigrate constitutional rights, to avoid the strictness of the *Chapman* test. See part II C, *ante*, at 15. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." R. Traynor, *The Riddle of Harmless Error* 50 (1970).

The other reason given to support the *Chapman* test is that the reasonable doubt standard is necessary to preserve defendant's right to a finding of guilt beyond a

reasonable doubt under *In re Winship*, 397 U. S. 358 (1970). See Saltzburg, *The Harm of Harmless Error*, 59 Va. L. Rev. 988, 991 (1973). This rationale cannot save *Chapman*. *Winship* was decided after *Chapman*, thus the right announced six years later in *Winship* was an unlikely motivation for the *Chapman* Court. Furthermore, the *Chapman* standard actually interferes with jury decisions. The high standard frequently requires a detailed examination of the trial record which creates an ever present danger of appellate second-guessing of the jury's verdict. See part II A, *ante*, at 12-13.

Chapman's reasonable doubt standard may have once served a useful purpose. It no longer does. It is impractical to administer, too difficult to meet, and inconsistent with other precedent. The Seventh Circuit has refused to extend the *Chapman* standard to violations of prophylactic rules on habeas corpus. *Brecht* v. *Abrahamson*, 944 F. 2d 1363, 1375 (CA7 1991). *Amicus* submits that it is better to overrule an unprincipled decision than simply to refuse to extend it. "Wisdom too often never comes, and so one ought not to reject it merely because it comes too late." *Wolf* v. *Colorado*, 338 U. S. 25, 47 (1949) (Rutledge, J., dissenting).

III. The standard of *Kotteakos* v. *United States* is the proper standard for replacing *Chapman*.

Congress has mandated the proper standard for determining harmless error in 28 U. S. C. § 2111.[3] This statute and the cases interpreting it, *Kotteakos* v. *United States*, 328 U. S. 750 (1946) and *United States* v. *Lane*, 474 U. S. 438 (1986), provide a flexible, practical standard that

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3. "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

strikes a proper balance between preserving the rule of law and preventing unnecessary retrials.

The *Kotteakos* Court interpreted the predecessor to section 2111, former 28 U. S. C. § 391, 40 Stat. 1181. The Court set out to strike a proper balance, disregarding unimportant error while maintaining the integrity of the law. *Kotteakos* started by recognizing the purpose behind harmless error. Before the harmless error rule took hold, the frequency of reversal was so great "that criminal trial became a game for sowing reversible error in the record . . . ." 328 U. S., at 759. Harmless error was meant to end the game playing and close the loopholes. See *id.*, at 759-760.

These principles spurred Congress to action, and this Court kept them in mind when interpreting the statute. It recognized that hard and fast rules could not work well in an area heavily dependent upon the facts of each case. *Id.*, at 762. The Court also understood appellate courts could not determine guilt or innocence. *Id.*, at 763. But courts still had to assess the impact of the error on the jury's decision. *Id.*, at 764. The case by case nature of harmless error also mitigated against any systematic use of presumptions. The reviewing court had to look to the particular error in the setting of the particular case before it. See *id.*, at 765-766.

From these principles the following standard emerged.

> "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had *substantial influence*. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.*, at 765 (emphasis added).

This standard has several advantages over any competitors. It is a lower standard than the reasonable doubt standard of *Chapman*. See *Lane*, *supra*, 474 U. S., at 460-461 (Brennan, J., concurring in part and dissenting in part). Therefore, it will avoid many of the problems

associated with the *Chapman* standard. It will be less burdensome to apply than *Chapman*, as reviewing courts will not need to make the detailed inquiry of the record necessary to remove all reasonable doubt. See part II A, *ante*, at 12-13. Applying the less strict *Kotteakos* standard will promote the social good of fewer reversals for unimportant errors and make courts more willing to apply this Court's harmless error standard. See part II C, *ante*, at 13-19. Thus, applying *Kotteakos* instead of *Chapman* may actually lead to a greater respect for constitutional rights. Cf. R. Traynor, *The Riddle of Harmless Error* 50 (1970).

Another crucial advantage of *Kotteakos* is that it comes with congressional authority. *Kotteakos* only interpreted the predecessor to section 2111. The difference between section 2111 and former section 391 does not undermine the *Kotteakos* test. If anything, the new statute provides a less restrictive definition of harmless error. Section 2111 removes the qualifier "technical" from the statute, providing possibly greater scope for harmless error. See *Lane*, *supra*, 474 U. S., at 448. In any event, *Kotteakos* supplies the current standard for nonconstitutional harmless error in federal courts. See *id.*, at 448-449.

Some will object to *Kotteakos* on the ground that it was never meant to apply to constitutional error. See *Lane*, *supra*, 474 U. S., at 460-461 (Brennan, J., concurring in part and dissenting in part). *Kotteakos* did not deal with a constitutional error, but involved a variance between the proof at trial and the charge in the indictment. See 328 U. S., at 755. Thus any statements in *Kotteakos* on constitutional error are no more than dicta. See *Cohens* v. *Virginia*, 6 Wheat. (19 U. S.) 264, 399-400 (1821).

What the *Kotteakos* Court did say about constitutional error was that if error had little effect on the jury "the judgment should stand except *perhaps* where the departure is from a constitutional norm or a specific command of Congress." *Kotteakos*, *supra*, 328 U. S., at 764-765 (emphasis added) (footnote omitted). The use of the equivo-

cal "perhaps" indicates *Kotteakos* could be used for harmless constitutional error. Footnote 19, which came after the word "norm" in the passage quoted above is no more restrictive. It states that cases have been reversed for "forced confessions . . . although on other evidence guilt might be taken to be clear." *Id.*, at 765, n. 19. This dealt with just one category of error that, until *Arizona* v. *Fulminante*, 113 L. Ed. 2d 302, 331-332, 111 S. Ct. 1246, 1265-1266 (1991), had not been considered to be subject to harmless error analysis.[4] See *Payne* v. *Arkansas*, 356 U. S. 560, 567-568 (1958).

Kotteakos did not need to dwell on constitutional error because at that time constitutional law was much less complicated. Today, however, the Constitution has become a detailed code of criminal procedure. See Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 155-156 (1970). Many of these new rights now protected are far from fundamental. See *Rose* v. *Lundy*, 455 U. S. 509, 543, n. 8 (1982) (Stevens, J., dissenting). Constitutional law needs the *Kotteakos* standard much more today than it did in 1949. See part II D, *ante*, at 21.

The other reason not to adopt *Kotteakos*, that the Constitution deserves more protection, is dealt with in part II, *ante*, at 20-23, which dismisses this argument as a reason for retaining the *Chapman* standard. This argument also denigrates the protection offered by *Kotteakos*. As the Court below noted, it is strict enough to protect federal statutes and rules in federal trials. See Pet. App. 12d. This Court has thought enough of *Kotteakos* to apply

4. Another possible objection, that adopting the *Kotteakos* standard would make all constitutional rights subject to harmless error, is meritless. This Court only needs to adopt the *Kotteakos* standard for those constitutional errors that can be harmless. Those rights concerning "the framework within which the trial proceeds," *Arizona* v. *Fulminante*, 113 L. Ed. 2d 302, 331, 111 S. Ct. 1246, 1265 (1991) need not be subject to harmless error.

it to the harmless error rule of the Federal Rule of Criminal Procedure 52(a). See *Lane*, *supra*, 474 U. S., at 449. Federal rules and statutes have not collapsed because of *Kotteakos*, and neither will the Constitution. Courts today will not use harmless error to avoid the Constitution, see part II D, *ante*, at 20-23, and they should be given a chance to apply this superior standard.

Adopting the *Kotteakos* rule has other incidental benefits. It will lessen the number of standards for harmless error, a desirable simplification of the law. See Traynor, *supra*, at 48. It is also a standard federal courts are used to applying, thus lessening the costs of transition from *Chapman*. But the primary reason for adopting *Kotteakos* is respect. Respect for the statute enacted by Congress, respect for the courts that apply the complex creature our constitutional law has become, and respect for trials that are fundamentally fair.

IV. What "error" there was, if any, is harmless.

The present case demonstrates the difficulty of applying the exacting standard of *Chapman* to alleged constitutional error. At trial, three people testified that they had conversations with petitioner and he never mentioned shooting Roger Hartman to any of them. See *State* v. *Brecht*, 421 N. W. 2d 96, 100-101 (Wis. 1988). All of these statements occurred before any *Miranda* warnings. See *ibid*. Admission of all three was clearly constitutional. See *id*., at 102. Comment on Brecht's failure to mention the accident on each of these three occasions would have been entirely proper.

The alleged violations of *Doyle* v. *Ohio*, 426 U. S. 610 (1976) occurred when the prosection made several broad references to the fact that Brecht had never told his story until the trial. The prosecutor did not point out that Brecht had been silent after being given his *Miranda* warnings at arraignment. See *Brecht*, *supra*, 421 N. W. 2d,

at 103. The inference that petitioner did not talk after *Miranda* warnings should not constitute a *Doyle* violation.[5]

In *Doyle*, the only silence referred to by the prosecution was that which occurred after defendant's arrest and *Miranda* warnings. See *Doyle*, 426 U. S., at 612-614. In this case, the prosecution stated that Brecht had never told his story until trial, he was not punishing petitioner for heeding the *Miranda* warnings, but for his failure to mention the shooting to people he talked to before the *Miranda* warnings. It is unlikely that the prosecution even cared about the post-*Miranda* silence. The testimony of the three witnesses was much more damaging than Brecht's silence after his initial appearance. Had the prosecutor simply changed the wording of the offending statements to refer only to the testimony of the three witnesses, the statements would have lost none of their relevance and been completely insulated from *Doyle* attack. The present case involves a poor use of *Doyle*. It was meant to protect *Miranda*'s guarantee of silence, not to correct a prosecutor's syntax.

The fact that courts have found that this violated *Doyle* shows how technical constitutional criminal procedure has become. The district attorney was cognizant of *Doyle* error and took steps to avoid it. This must be why he introduced evidence that Brecht had not been given his *Miranda* warnings after the arrest. See *Brecht*, *supra*, 421 N. W. 2d, at 100-101. Yet the district attorney was tripped up because of subsequent slight over-statements constituting a few lines in a 900-page manuscript. Law as technical as this needs a less demanding harmless error standard.

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5. The comment in this case is strongly analogous to that in *United States* v. *Hasting*, 461 U. S. 499 (1983), where Justice Stevens found no *Griffin* error. *Id.*, at 512 (concurring in the judgment). The majority did not consider that question properly before the Court, but noted that Justice Stevens "may well be correct." *Id.*, at 506, n. 4.

Even if this was *Doyle* error, it was harmless, even under *Chapman*. The fact that two of the four courts that reviewed this case did not find it harmless speaks volumes about the problems with *Chapman*. Whatever prejudice that came from the inference of post-*Miranda* silence was overwhelmed by the evidence of Brecht's failure to bring up his story during three separate conversations. Thus, the alleged *Doyle* error was not prejudicial and therefore harmless beyond a reasonable doubt.

Harmless error is supposed to "promote[] public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware* v. *Van Arsdall*, 475 U. S. 673, 681 (1986). In the present case, two courts applying *Chapman* have allowed the prosecution to be tripped up in, at best, a hypertechnical violation of *Doyle*. If *Chapman* can allow this to happen, then it makes a mockery of harmless error.

CONCLUSION

The judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

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